

Comment Ends

9/11/98

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PORT YACHT BASIN, INC., d/b/a  
PACIFIC YACHT BASIN, and  
CHARLES AND HELEN VAN  
VOLKENBURG,

Defendants.

**C98-5362** *RJB*

Civil Action No.

COMMENCEMENT BAY NEARSHORE/  
TIDEFLATS SUPERFUND SITE --  
MIDDLE WATERWAY PROBLEM AREA**CONSENT DECREE****I. BACKGROUND**

A. The United States of America (United States or U.S.), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9606 and 9607, seeking injunctive relief regarding the cleanup of the Middle Waterway Problem Area, part of

CONSENT DECREE -- Page 1

U.S. DEPARTMENT OF JUSTICE  
Environmental Enforcement Section  
c/o NOAA GCNW  
BIN C 15700  
Seattle, Washington 98115-0070  
(206) 526-6617

USEPA SF



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1 the Commencement Bay Nearshore/Tideflats Superfund Site in Tacoma, Washington,  
2 and recovery of costs incurred and to be incurred in responding to the release or threat of release  
3 of hazardous substances at or in connection with the Site.

4 B. As a result of the release or threatened release of hazardous substances at the Site,  
5 EPA has undertaken response actions at or in connection with the Site under Section 104 of  
6 CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing  
7 these response actions, EPA has incurred and will continue to incur response costs at or in  
8 connection with the Site. Response actions taken to date include performance of a Remedial  
9 Investigation/Feasibility Study and Record of Decision and oversight of Pre-Remedial Design  
10 activities.

11 C. The Regional Administrator of EPA, Region 10, or his delegatee, has determined the  
12 following:

13 1. Prompt settlement with the Settling Defendant is practicable and in the public  
14 interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);

15 2. Based upon EPA's review of tax returns, financial statements and other  
16 documents provided by Settling Defendant, Settling Defendant lacks the ability to contribute  
17 financially to the response costs incurred and to be incurred in connection with the Site by the  
18 EPA Hazardous Substance Superfund and by private parties.

19 3. Settling Defendant, as owners and operators of a facility at the Site, did not  
20 conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous  
21 substance at the facility within the meaning of Section 122(g)(1)(B) of CERCLA, 42 U.S.C. §  
22 9622(g)(1)(B). Settling Defendant also did not contribute to the release or threat of release of a  
23 hazardous substance at the facility through any action or omission within the meaning of Section  
24 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622(g)(1)(B).

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3 D. The Settling Defendant does not admit any liability to Plaintiff arising out of the  
4 transactions or occurrences alleged in the complaint.

5 E. The United States and Settling Defendant agree that settlement without further  
6 litigation and without the admission or adjudication of any issue of fact or law is the most  
7 appropriate means of resolving this action with respect to Settling Defendant.

8 THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED,  
9 ADJUDGED, and DECREED:

10 **II. JURISDICTION**

11 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.  
12 §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over Settling  
13 Defendant. Settling Defendant consents to and shall not challenge the terms of this Consent  
14 Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

15 **III. PARTIES BOUND**

16 2. This Consent Decree is binding upon the United States and upon Settling Defendant  
17 and its successors and assigns. Any change in ownership or corporate or other legal status of  
18 Settling Defendant, including but not limited to, any transfer of assets or real or personal property  
19 shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

20 **IV. STATEMENT OF PURPOSE**

21 3. By entering into this Consent Decree, the mutual objectives of the Parties are:

- 22 (a) To reach a final settlement with the Settling Defendant with respect to the  
23 Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), to require  
24 Settling Defendant to cooperate with parties performing remedial design  
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1 and remedial action activities, to provide access to its property upon  
2 request, and to resolve its alleged civil liability under Sections 106 and 107  
3 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard  
4 to the Site and for response costs incurred and to be incurred at or in  
5 connection with the Site, thereby reducing litigation relating to the Site;  
6 and

- 7 (b) To provide for full and complete contribution protection for Settling  
8 Defendant with regard to the Site pursuant to Sections 113(f)(2) and  
9 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f) and 9622(g)(5).

#### 10 V. DEFINITIONS

11 4. Unless otherwise expressly provided herein, terms used in this Consent Decree that  
12 are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning  
13 assigned to them in the statute or regulations. Whenever the terms listed below are used in this  
14 Consent Decree, the following definitions shall apply:

- 15 (a) "CERCLA" shall mean the Comprehensive Environmental Response,  
16 Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601,  
17 et seq.  
18 (b) "Consent Decree" or "Decree" shall mean this Consent Decree.  
19 (c) "Day" shall mean a calendar day. In computing any period of time under  
20 this Consent Decree, where the last day would fall on a Saturday, Sunday,  
21 or federal holiday, the period shall run until the close of business of the  
22 next working day.  
23 (d) "EPA" shall mean the United States Environmental Protection Agency and  
24 any successor departments, agencies or instrumentalities.

- 1 (e) "EPA Hazardous Substance Superfund" shall mean the Hazardous  
2 Substance Superfund established by the Internal Revenue Code, 26 U.S.C.  
3 § 9507.
- 4 (f) "Interest" shall mean interest at the current rate specified for interest on  
5 investments of the EPA Hazardous Substance Superfund established by 26  
6 U.S.C. § 9507, compounded annually on October 1 of each year, in  
7 accordance with 42 U.S.C. § 9607(a).
- 8 (g) "Paragraph" shall mean a portion of this Consent Decree identified by an  
9 Arabic numeral or an upper or lower case letter.
- 10 (h) "Parties" shall mean the United States and the Settling Defendant.
- 11 (i) "Response costs" shall mean all costs of "response" as that term is defined  
12 by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).
- 13 (j) "Section" shall mean a portion of this Consent Decree identified by a  
14 roman numeral.
- 15 (k) "Settling Defendant" shall mean Port Yacht Basin, Inc., dba Pacific Yacht  
16 Basin, a corporation registered in the State of Washington, whose  
17 shareholders are Charles and Helen Van Volkenburg, and whose address  
18 is 609 E. 11th Street, Tacoma, Washington, 98421, and shall also mean  
19 Charles and Helen Van Volkenburg, individually.
- 20 (l) "Site" shall mean the Middle Waterway Problem Area, part of the  
21 Commencement Bay Nearshore/Tideflats Superfund Site, located in  
22 Tacoma, Washington.
- 23 (m) "United States" shall mean the United States of America, including its  
24 departments, agencies and instrumentalities.

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## VI. PERFORMANCE

5. Settling Defendant shall not be required to make a payment to the EPA Hazardous Substance Superfund. Settling Defendant shall, however, cooperate fully with all parties performing pre-remedial design, remedial design and remedial action activities at the Middle Waterway Problem Area and shall provide access to its property upon request. Settling Defendant shall not interfere in any way with performance of pre-remedial design, remedial design and remedial action activities at the Middle Waterway Problem Area.

## VII. FAILURE TO PERFORM

6. If EPA determines that Settling Defendant has failed to perform in accordance with this Consent Decree, the Covenant Not To Sue set forth in Section IX of this Consent Decree and the Contribution Protection set forth in Section XII of this Consent Decree are null and void.

## VIII. CERTIFICATION OF SETTLING DEFENDANT

7. By signing this Consent Decree, Settling Defendant certifies that, to the best of its knowledge, it has:

- (a) Conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal or a hazardous substance, pollutant or contaminant at or in connection with the Site;
- (b) Not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a

1 suit against it regarding the Site; and

- 2 (c) Fully complied with any and all EPA requests for information regarding  
3 the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§  
4 9604(e) and 9622(e).

5 **IX. COVENANT NOT TO SUE BY UNITED STATES**

6 8. In consideration of the performance that will be provided by Settling Defendant under  
7 the terms of this Consent Decree, and except as specifically provided in Section X (Reservations  
8 of Rights by United States), the United States covenants not to sue or take administrative action  
9 against the Settling Defendant pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606  
10 or 9607 relating to the Site. With respect to Settling Defendant, this covenant not to sue is  
11 conditioned upon:

- 12 (a) Satisfactory performance by Settling Defendant of all obligations under  
13 this Consent Decree; and  
14 (b) The veracity of the information provided to EPA by Settling Defendant  
15 relating to Settling Defendant's involvement with the Site and its financial  
16 status.

17 This covenant not to sue extends only to Settling Defendant and does not extend to any other  
18 person.

19 **X. RESERVATIONS OF RIGHTS BY UNITED STATES**

20 9. The covenant not to sue by the United States set forth in Paragraph 8 does not pertain  
21 to any matters other than those expressly specified in Paragraph 8. The United States reserves,  
22 and this Consent Decree is without prejudice to, all rights against Settling Defendant with  
23 respect to all other matters including, but not limited to, the following:

- 24 (a) Liability for failure to meet a requirement of this Consent Decree;

- 1 (b) Criminal liability;
- 2 (c) Liability for damages for injury to, destruction of, or loss of natural
- 3 resources, and for the costs of any natural resource damage assessment; or
- 4 (d) Liability arising from the future arrangement for disposal or treatment of
- 5 a hazardous substance, pollutant or contaminant at the Site after the date
- 6 of lodging of this Consent Decree.

7 10. Notwithstanding any other provision in this Consent Decree, the United States

8 reserves, and this Consent Decree is without prejudice to, the right to institute proceedings

9 against Settling Defendant in this action or in a new action or to issue an administrative order

10 to Settling Defendant seeking to compel Settling Defendant to perform response actions relating

11 to the Site, and/or to reimburse the United States for additional costs of response, if information

12 is discovered which indicates that Settling Defendant contributed hazardous substances to the

13 Site in such greater amount or of such greater toxic or other hazardous effects that Settling

14 Defendant no longer qualifies as a *de minimis* party at the Site because Settling Defendant

15 contributed more than one percent of the hazardous substances at the Site, or contributed

16 hazardous substances which are significantly more toxic or are of significantly greater hazardous

17 effect than other hazardous substances at the Site.

18 **XI. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

19 11. Settling Defendant covenants not to sue and agrees not to assert any claims or causes

20 of action against the United States or its contractors or employees with respect to the Site or this

21 Consent Decree including, but not limited to:

- 22 (a) Any direct or indirect claim for reimbursement from the EPA Hazardous
- 23 Substance Superfund based on Sections 106(b)(2), 107, 111, 112 or 113 of
- 24 CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612 or 9613, or any



1 other provision of law;

2 (b) Any claim arising out of response activities at the Site;

3 (c) Any claim against the United States pursuant to Sections 107 and 113 of  
4 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

5 12. Nothing in this Consent Decree shall be deemed to constitute approval or  
6 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611,  
7 or 40 C.F.R. § 300.700(d).

8 13. Settling Defendant covenants not to sue and agrees not to assert any claims or causes  
9 of action against other potentially responsible parties pursuant to Sections 107 or 113 of  
10 CERCLA, 42 U.S.C. §§ 9607 and 9613.

11 **XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

12 14. Nothing in this Consent Decree shall be construed to create any rights in, or grant any  
13 cause of action to, any person not a Party to this Consent Decree. The United States and Settling  
14 Defendant each reserve any and all rights (including, but not limited to, any right to  
15 contribution), defenses, claims, demands, and causes of action which each Party may have with  
16 respect to any matter, transaction or occurrence relating in any way to the Site against any person  
17 not a Party hereto.

18 15. In any subsequent administrative or judicial proceeding initiated by the United States  
19 for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling  
20 Defendant shall not assert, and may not maintain, any defense or claim based upon the principles  
21 of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses  
22 based upon any contention that the claims raised in the subsequent proceeding were or should  
23 have been brought in the instant action; provided, however, that nothing in this Paragraph affects  
24 the enforceability of the covenant not to sue included in Paragraph 8.

1 16. The Parties agree, and by entering this Consent Decree this Court finds, that Settling  
2 Defendant is entitled, as of the date of entry of this Consent Decree, to protection from  
3 contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42  
4 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The  
5 "matters addressed" in this Consent Decree are all response actions taken and to be taken by the  
6 United States and by private parties, and all response costs incurred and to be incurred by the  
7 United States and by private parties, at or in connection with the Site.

### 8 XIII. RETENTION OF JURISDICTION

9 17. This Court shall retain jurisdiction over this matter for the purpose of interpreting and  
10 enforcing the terms of this Consent Decree.

### 11 XIV. INTEGRATION

12 18. This Consent Decree constitutes the final, complete and exclusive agreement and  
13 understanding among the Parties with respect to the settlement embodied in this Consent Decree.  
14 The Parties acknowledge that there are no representations, agreements or understandings relating  
15 to the settlement other than those expressly contained in this Consent Decree.

### 16 XV. PUBLIC COMMENT

17 19. This Consent Decree shall be lodged with the Court for a period of not less than thirty  
18 (30) days for public notice and comment. The United States shall file with the Court any written  
19 comments received and the United States' response thereto. The United States reserves the right  
20 to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or  
21 considerations which indicate that this Consent Decree is inappropriate, improper or inadequate.  
22 Settling Defendant consents to entry of this Consent Decree without further notice, and the  
23 United States reserves the right to oppose an attempt by any person to intervene in this civil  
24 action.

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**XVI. EFFECTIVE DATE**

20. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 19.

**XVII. SIGNATORIES/SERVICE**

21. The undersigned representatives of Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or her delegatee, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such party to this document.

22. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

23. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court.

24. Contemporaneous with the filing of the complaint in this action, the United States shall file a stipulation or motion for an extension of time to answer the complaint in favor of Settling Defendant, which extension shall run until 30 days after the United States withdraws or withholds its consent pursuant to Section XV (Public Comment) or the Court declines to enter this Consent Decree.

1 SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 199\_.  
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5 UNITED STATES DISTRICT JUDGE  
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**U.S. DEPARTMENT OF JUSTICE**  
**Environmental Enforcement Section**  
**c/o NOAA GCNW**  
**BIN C 15700**  
**Seattle, Washington 98115-0700**  
**(206) 526-6617**

1  
2 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States  
3 v. Port Yacht Basin, Inc., dba Pacific Yacht Basin relating to the Middle Waterway Problem Area  
4 of the Commencement Bay Nearshore/Tideflats Site in Tacoma, Washington.

5  
6 FOR THE UNITED STATES OF AMERICA

7  
8 Date: 6/25/98

Lois J. Schiffer  
9 LOIS J. SCHIFFER  
10 ASSISTANT ATTORNEY GENERAL  
11 ENVIRONMENT AND NATURAL RESOURCES DIVISION

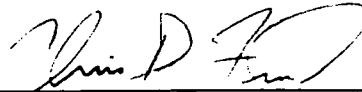
12  
13 7-2-98

Sean Corman  
14 SEAN CARMAN  
15 Trial Attorney  
16 Seattle Field Office  
17 Environmental Enforcement Section  
18 Environment and Natural Resources Division  
19 U.S. Department of Justice  
20 c/o NOAA DARC  
21 7600 Sand Point Way, NE 98115-0070  
22 (206) 526-6617

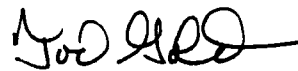
23 KATRINA C. PFLAUMER  
24 United States Attorney for the  
25 Western District of Washington  
26 Seattle, Washington

27 BRIAN C. KIPNIS  
28 Assistant United States Attorney  
Western District of Washington  
U.S. Department of Justice  
3600 Seafirst Fifth Avenue Plaza  
800 Fifth Avenue, Room 3600  
Seattle, Washington 98104

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States  
2 v. Port Yacht Basin, Inc., dba Pacific Yacht Basin relating to the Middle Waterway Problem  
3 Area of the Commencement Bay Nearshore/Tideflats Site in Tacoma, Washington.

4 

5 CHRIS D. FIELD  
6 Manager  
7 Emergency Response/Site Cleanup Unit 1  
8 U.S. Environmental Protection Agency  
9 1200 6th Avenue  
10 Seattle, WA 98101

11 

12 TOD A. GOLD  
13 Assistant Regional Counsel  
14 U.S. Environmental Protection Agency  
15 1200 6th Avenue  
16 Seattle, WA 98101

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States  
2 v. Port Yacht Basin, Inc. dba Pacific Yacht Basin relating to the Middle Waterway Problem  
3 Area of the Commencement Bay Nearshore/Tideflats Site in Tacoma, Washington.

4 FOR DEFENDANT PORT YACHT BASIN, INC.,  
5 dba PACIFIC YACHT BASIN, and Charles  
6 and Helen Van Volkenburg

7 Date: 9/29/97

Charles W. Van Volkenburg

8 Date: 9-29-97

Helen S. Van Volkenburg

10 [Please type in name and address of Pacific  
11 Yacht Basin's signatories.]

12 Agent Authorized to Accept Service on Behalf of Above-signed Party:

13 Name: CHARLES W. VAN VOLKENBURG

14 Title: PRESIDENT

15 Address: 609 E. 11th  
16 Tacoma, WA 98421

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26 CONSENT DECREE -- Page 15

27 U.S. DEPARTMENT OF JUSTICE  
28 Environmental Enforcement Section  
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